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No. 76-120

In the Supreme Court of the United States

OCTOBER TERM, 1976

UNITED STATES OF AMERICA, PETITIONER

v.

MARTIN LINEN SUPPLY COMPANY AND
TEXAS SANITARY TOWEL SUPPLY CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY MEMORANDUM FOR THE UNITED STATES

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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1. Respondents contend that the district court's decision to grant their motions for judgments of acquittal is not subject to appellate review because Fed. R. Crim. P. 29(c) authorizes a district judge to grant such a motion after a mistrial has been declared. That argument was not relied upon by the court of appeals and has nothing to recommend it. A rule authorizing a court to act upon a particular motion at a particular time does not determine the reviewability of a decision granting or denying the motion. Appealability is governed by another provision of law, 18 U.S.C. 3731, which authorizes the government to appeal from any order terminating a criminal case in the defendant's favor which may be reviewed without violating the Double Jeopardy Clause.

The decision below does not rely upon any inability to review judgments entered on the authority of Rule 29(c).[1] The court of appeals interpreted *United States* v. *Jenkins*, 420 U.S. 358, to mean that a post-trial[2] judgment in the defendant's favor can never be reviewed if a reversal will result in further trial proceedings, whether or not those further proceedings would themselves be barred by the Double Jeopardy Clause. That holding raises fundamental and important questions with respect to the scope of the government's right to appeal.

2. Respondents rely (Br. in Opp. 5, 7) upon *Fong Foo* v. *United States*, 369 U.S. 141, and *United States* v. *Robbins*, 510 F. 2d 301 (C.A. 6), certiorari denied, 423 U.S. 1048, for the proposition that the Double Jeopardy Clause precludes any review of a "judgment of acquittal."

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[1]Rule 29(c) authorizes a district court to grant a motion for judgment of acquittal after a jury has returned a verdict of guilty, as well as after a mistrial has been declared. The Court of Appeals for the Fifth Circuit has reversed at least two such judgments entered pursuant to Rule 29(c). *United States* v. *Burnette*, 524 F. 2d 29, certiorari denied, April 19, 1976 (No. 75-6102); *United States* v. *Cravero*, 530 F. 2d 666. In both cases the court of appeals held that the district judge erred in concluding that the evidence was not sufficient to support a verdict of guilty. If respondents' view were correct, *Burnette* and *Cravero* could not stand, because the judgments of acquittal had been entered on the authority of Rule 29(c). The court of appeals did not overrule *Burnette* or *Cravero*; it therefore could not have adopted respondents' theory that Rule 29(c) limits the right to appeal created by Section 3731.

[2]In the court of appeals' view some post-trial motions take place so long after trial that they are "really" pre-trial motions. See Pet. App. 8a-9a. Rule 29(c) has significance, in the court of appeals' view, only insofar as it divides the two classes of motions. Because the court of appeals believes that this division has double jeopardy significance, it expressed the opinion that an appeal should have been allowed in *United States* v. *Sanford*, petition for a writ of certiorari pending, No. 75-1867.

This Court has rejected, however, the argument that the words "judgment of acquittal" should have such talismanic significance, and the court of appeals accorded them none.[3] Both *Fong Foo* and *Robbins* dealt with orders entered in mid-trial terminating the prosecution. Although we believe that *Robbins* was wrongly decided, and that *Fong Foo* should no longer be followed to the extent that it appeared to make reviewability turn upon the language employed by the trial judge, it should be apparent that neither case supports the decision below, which did not involve a mid-trial termination and in which the mistrial provides independent justification for the holding of a second trial.

For these reasons, in addition to those stated in the petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

ROBERT H. BORK,
Solicitor General.

SEPTEMBER 1976.

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[3]Pet. App. 2a n. 3. See, *e.g.*, *Serfass* v. *United States*, 420 U.S. 377, 390-393.

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